

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE,

Plaintiff and Respondent,

v.

NICHOLAS REAL,

Defendant and Appellant.

B212809

(Los Angeles County  
Super. Ct. No. BA 325156)

APPEAL from a judgment of the Superior Court of Los Angeles County.  
Marcelita V. Haynes, Judge. Affirmed as modified.

Valerie G. Wass, under appointment by the Court of Appeal, for Defendant  
and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant  
Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Steven D.  
Matthews and Richard S. Moskowitz, Deputy Attorneys General, for Plaintiff and  
Respondent.

---

Defendant Nicholas Real timely appealed from his convictions on two counts of assault with a firearm and one count of brandishing a firearm at a person in a motor vehicle. The jury found allegations that defendant personally used a firearm true but found the gang allegations to be not true. The court sentenced defendant to nine years and four months. Defendant contends there was insufficient evidence that the object he was holding in his hand during the charged incident was a firearm and, if there was, there was insufficient evidence the firearm was loaded. We affirm as modified.

## **FACTUAL BACKGROUND**

### **I. Prosecution Case**

#### **A. The Incident**

On July 2, 2007, at about 7:00 p.m., Carlos Burela<sup>1</sup> was in the front passenger's seat of the family car, a Pathfinder, near Estara and Andrita in the City of Los Angeles. D'Yanira Hernandez, Burela's wife, was driving, and their three young children were in the back. Burela and Hernandez were looking for a school for one of their children.

As they approached a stop sign, Burela saw a red pickup truck and a gray Cadillac side by side in front of them, blocking their way. The pickup truck was directly in front of Hernandez's car and was headed in the same direction. The Cadillac was facing the opposite way. The occupants of the pickup truck and the Cadillac "were chatting with each other." Hernandez honked her horn in an effort to get the two cars out of the way. When neither car moved, Hernandez sounded the horn again. After waiting "a couple of more minutes" without any movement, Hernandez honked a third time. There was only one man inside the Cadillac.

---

<sup>1</sup> Burela, who was not a gang member, had been convicted of felony transportation/sales of a controlled substance and felony burglary in 1993 and 1996 respectively.

The pickup truck “got out of the way,” while the Cadillac pulled up alongside the Pathfinder. Appellant yelled, ““bitch”” at Hernandez. Burela replied, ““fuck you,”” while his wife continued driving. Appellant, who was only about five feet away from Hernandez, looked angry.

As Hernandez turned right on Estara, appellant turned around and followed her. When she stopped at a red light, the Cadillac came up next to the Pathfinder on the left. Looking toward Burela and his wife, appellant pointed a small gun at them. The gunman, whom Burela and Hernandez identified in court as appellant, told Hernandez to move.

Hernandez saw appellant take out a small, black “pistol” and point it toward her and her family.<sup>2</sup> Moving the gun back and forth, appellant eventually pointed it at everyone in the family. Appellant yelled, ““Get out of the way. Get out of the way.”” Both vehicles continued to proceed forward. At one point, the Cadillac tried to get in front of the Pathfinder, but Hernandez would not allow appellant to do so. Then appellant slowed down and got behind the Pathfinder and tried to drive to the right of it, but was unable to do so because the right side was blocked by parked cars.

Appellant continued to follow the family “for about three blocks.” Hernandez and Burela had to abandon their plan to visit the school because appellant was threatening them with a gun.

Hernandez yelled at appellant, who was still holding the gun, and told him, ““Please. Stop. I have my kids.”” Appellant replied, ““Okay. Tell him that I’ll see him afterwards.”” Looking at Burela, appellant pointed his right index finger toward his right eye and then pointed it at Burela. After making that threat, appellant made a U-turn and left the scene. Hernandez was scared of appellant and “scared of his family.”

---

<sup>2</sup> The transcript reflects that Hernandez initially described the weapon as “like, an automatic,” but during cross-examination, the interpreter volunteered the witness had used a Spanish word “escuadra,” that translates as “T-square.” Subsequently, the interpreter clarified that she should have translated the word as “tri-square,” but, “in the context of weapons, an ‘escuadra’ is the term usually used to describe a semiautomatic -- automatic pistol.”

Burela called 9-1-1 as the Cadillac continued to follow; he used the speakerphone because he was afraid appellant would shoot if he saw Burela was calling for help. A CD of the call and a transcript (with an English translation) were marked as exhibits. The call was not played for the jury during trial, but a compact disk player was provided so that the jury could listen to the call during deliberations even though it was in Spanish. The jurors were provided with copies of the transcript.

Burela told the 9-1-1 operator that a person with a gun was trying to shoot them, that he was at Avenue 36 near Eagle Rock and San Fernando, and that he had last seen appellant in the vicinity of Eagle Rock and Avenue 39. Burela and his oldest son wrote down the license plate number of the Cadillac on a piece of paper and gave the number to the 9-1-1 operator. That license plate number had been issued to a car registered to appellant. The 9-1-1 operator told Burela the police would meet the family at the Irving Middle School on Espada.

Less than an hour after Burela made the 9-1-1 call, the police transported him and Hernandez to another location to see if they could identify the person who pointed the gun at them. After separating Burela and Hernandez, the police showed Burela three people and asked if the gunman was among them. Burela recognized appellant by his hat, shirt and part of his face. Hernandez identified appellant as the man who pointed the gun at her car and noted he was wearing the same clothing he had been wearing when he was in the Cadillac.

On July 31, 2007, Burela went to a live lineup, in which he viewed six individuals. Burela positively identified appellant. Hernandez also participated in a live lineup; she identified appellant as the gunman.

At about 7:13 p.m., on July 2, Los Angeles Police Officer Robert Lona received a radio broadcast about an assault with a deadly weapon involving a silver Cadillac with a particular license plate number. According to the broadcast, the Cadillac had been seen in the vicinity of Drew Street. At about 7:50 p.m., Lona and his partner arrived in the area and began looking for the suspect vehicle.

As the officers drove southbound on Drew, Lona saw the Cadillac traveling in the opposite direction. Just as the officers executed a U-turn, the Cadillac stopped on Drew Street. Lona saw the driver, whose name was Sergio Martinez, get out of the car and walk toward appellant, who was standing on the sidewalk. The officers conducted a felony stop, ordered appellant and Martinez to lie down on the ground, and handcuffed the two men, “pending further investigation.” When appellant was searched, no weapons were recovered. Another officer, Michael Lanza, responded to radio dispatch for backup. After arriving at the location, Lanza searched the Cadillac; he did not find any weapons inside.

## **B. Gang Evidence**

During his gang assignment, Officer Eduardo Gonzales had contact with appellant, and he or his partner filled out field interview cards. On February 10, April 14 and July 21, 2005, appellant admitted he belonged to the Avenues gang. While a gang officer, Oscar Castellanos had contact with appellant and filled out field interview cards. On April 5, 2006, appellant admitted he was a member of the Avenues gang. During his tenure as a gang officer, Eric Hurd had contact with appellant, who admitted his affiliation with the Avenues gang on March 1, 2006.

Thomas Deluccia testified as the prosecution’s gang expert. The Avenues gang was one of the gangs to which Deluccia was assigned from April 2002 to March 2006. The business of the gang revolved primarily around the narcotics trade. The area of Drew Street where appellant was taken into custody was controlled by the Avenues gang and heavily covered with gang graffiti. Deluccia was familiar with the residents of 3304 Drew Street, and at times, it was claimed as a residence by appellant, his mother, his brothers and several people. There was a tremendous amount of narcotics sales activities at that residence. Deluccia opined appellant was an active tenured member of the Avenues gang and a “shot caller” in the gang.

According to Deluccia, while a younger gang member might have fired his weapon even though a child was in the car, a more seasoned member would be more inclined not to shoot and perhaps settle the dispute later because when a child is shot, it brings more public attention to the gang and makes it harder for them to commit their activities. Due to threats from rival gang members, an Avenues gang member would not want to be caught without a gun or the ability to protect himself. There would be no point in an Avenues gang member going out with an unloaded weapon because he would lack the ability to protect himself or assault other gang members. Deluccia had never found any Avenues gang member to have a fake gun.

## **II. Defense Case**

Appellant presented a defense of mistaken identity.

Sergio Martinez, appellant's cousin, was detained and arrested by police on July 2, 2007, along with appellant. Martinez testified that on that date he was involved in an incident while driving appellant's silver Cadillac. Martinez, who had not seen his cousin in about two years, borrowed the car from a parking lot for an apartment building on Drew Street where appellant's father lived. Martinez, who was alone at the time, was driving on Andrita toward San Fernando Road. At about 5:00 or 5:30 p.m., while stopped at a stop sign at Andrita and Avenue 32, Martinez had a conversation with someone in a red pickup truck that was headed in the opposite direction.

While Martinez talked to the person in the truck, a woman drove up behind the truck in a Pathfinder and started honking her horn. Martinez continued his conversation with the person in the truck; neither moved, and the woman kept honking her horn for "40 seconds to a minute." After a pause, the woman "started honking again." Martinez and the red truck drove away. As Martinez passed the woman, he "assaulted her" by calling her a "bitch." At that point, the male passenger "started screaming too" and exclaimed, "fuck you."

Thinking the man was telling him to come back, Martinez made a U-turn and headed back toward Avenue 32. At the intersection with Avenue 32, Martinez made a right turn. The Pathfinder, which had turned right on Avenue 32, was paused at a stop sign. As Martinez approached from the rear, the Pathfinder turned left. Martinez also turned left and came up alongside the Pathfinder, which was waiting for a stop light. When Martinez stopped at the light, one lane to the left of the Pathfinder, he told the driver of the Pathfinder to move. Holding a black, square-shaped Boost cellphone in his right hand, which he claimed he had opened to check the time even though the Cadillac had a clock, Martinez extended his arm, gesturing for the driver to get out of the way. The passenger in the Pathfinder leaned forward and they “started verbally assaulting each other.”

After the light turned green, Martinez and the Pathfinder proceeded straight ahead, staying abreast of each other. Continuing their exchange of curses, the two men screamed at each other until the vehicles reached Eagle Rock Boulevard. Activating her blinker, the woman driving the Pathfinder signaled and executed a right turn. Martinez followed. At that point, the woman told Martinez that she had her children with her. Looking at the back seat of the Pathfinder, Martinez noticed the children for the first time and said, ““Fuck you then. I’ll see you later.”” Martinez drove away, returning to the parking lot where he had picked up the car. By that time, Martinez and the man in the Pathfinder had been trading profanities for about 10 minutes.

Shortly after Martinez arrived at the location on Drew, a police car pulled up. The officers drew guns and ordered Martinez to “get on the floor” and then directed him to take part in a lineup with appellant and appellant’s brother Francisco. Once the lineup procedure had been completed, the police took Martinez to the police station where they asked him to write down what he had been doing before he was stopped. Martinez did not mention the incident with the people in the car. Martinez claimed he had never told anyone the version of the incident he told at trial, but then admitted he had told it to defense counsel the week before. Martinez learned about the charges against appellant

when he saw appellant at the courthouse. When appellant described the case, Martinez told appellant “that was not him” and described his own encounter with the people in the Pathfinder.

Martinez admitted he had been arrested on November 26, 2007, along with two other men; the three men had been charged with “multiple counts of robbery against four separate victims”; he faced gang and weapons allegations in those cases; and he had twice been convicted of possessing drugs for sale. Although Martinez denied any affiliation with the Avenues or knowing much about gangs, he admitted he had been ordered not to associate with any members of the Avenues gang.

Officer Jesus Ramirez was part of the first unit responding to the call. Ramirez, a fluent Spanish speaker, separately interviewed Hernandez and Burela and wrote a report of what they said. Hernandez appeared to be “shaken up.” Other than a description of the suspect, Hernandez did not provide other specifics. Hernandez described the firearm as a “small handgun,” black in color. Hernandez told Ramirez the suspect called her a “bitch” but did not give any more details about what the suspect had said.<sup>3</sup> Burela described the suspect and reported the suspect used the word “bitch,” but did not refer to any other statement made by the suspect. Burela said the suspect was carrying a small black handgun. Neither Hernandez nor Burela said the gunman tried to put a round in the chamber, pull the trigger or fire the weapon.

Appellant testified he was raised in the house on Drew, then moved to Victorville to live with his common-law wife. Appellant denied pointing a firearm at Hernandez or her husband or admitting to the police that he was a gang member. On the day of his arrest, appellant had returned to Drew Street to visit his father and other family members. Appellant had arrived that morning and parked his Cadillac in the lot in front of his father’s apartment. Martinez had come by for a visit, arriving about noon. Appellant did

---

<sup>3</sup> On cross-examination, Ramirez testified he only spent 10 to 15 minutes interviewing both victims and did not always include everything witnesses told him in his reports. Ramirez stated Hernandez told him the suspect “made a gesture with his hand and pointed back towards the husband, essentially stating . . . ‘I’ll see [you] around.’”

not drive his car again that day, but his brother Jose did. Martinez borrowed the car around 7:00 p.m. to get something to eat.

Martinez returned about 15 minutes later at which point Jose wanted to go home. Jose took the keys from Martinez and drove away, but came back a few minutes later with his wife and daughter in the car. As Martinez was parking the car, a black and white police car came down the street, made a U-turn and sped toward the Cadillac. The police pointed their guns at appellant and his brother Francisco. When appellant inquired what was ““going on,”” the police told him, ““Shut up and just get on the floor. We’re going to shoot you.”” Appellant complied and got on the ground.

When the police handcuffed appellant, he asked why they did so and they responded they had received a report about a shootout on York. Appellant said he did not know what they were talking about. After a lineup, appellant was taken to county jail.

Appellant, who denied being an Avenues gang member, had been convicted of possession of a firearm in a school zone in 2001 and forgery in 2002. The city attorney had ordered appellant to stay away from 3304 Drew Street.

### **III. Rebuttal**

Officer Steven Aguilar had been assigned to the Avenues gang for over six years, was acquainted with appellant and knew him to be an Avenues member. Aguilar opined that Martinez was a member of the Avenues gang because he had been arrested with others in the gang, was a cousin of appellant and the other Reals, and used the moniker of “Bird.” Aguilar had monitored federal wiretaps and intercepted phone calls in which Martinez “conducted gang business, . . . indentified himself . . . as Bird,” and referred to other gang members by their monikers.

It is very common for a younger gang member to go into court and “take the rap” or “tak[e] the hit” for an older member or “shot caller,” either because he was ordered

to do so or because he wanted to gain status. An individual who does so will “be taken care of in jail or prison by other gang members” and will be “well respected” when he gets out. Gangs want their shot-callers out of the street rather than in custody because they are leaders and other members can listen to them. This fact is especially true of Drew Street (a clique of the Avenues) which has a “lot of younger gang members.”

## **DISCUSSION**

Appellant contends there was insufficient evidence the object in his hand during the incident was a firearm and, if there was sufficient evidence it was a firearm, there was insufficient evidence it was loaded. “To determine the sufficiency of the evidence to support a conviction, an appellate court reviews the entire record in the light most favorable to the prosecution to determine whether it contains evidence that is reasonable, credible, and of solid value, from which a rational trier of fact could find the defendant guilty beyond a reasonable doubt.” (*People v. Kipp* (2001) 26 Cal.4th 1100, 1128; see also *People v. Rodriguez* (1999) 20 Cal.4th 1, 11 [“The standard of review is the same in cases in which the prosecution relies mainly on circumstantial evidence.”].)

Appellant was convicted of two counts of assault with a firearm pursuant to Penal Code section<sup>4</sup> 245, subdivision (a)(2) and one count of brandishing a firearm at a person in a motor vehicle pursuant to section 417.3. “[F]irearm means any device, designed to be used as a weapon, from which is expelled through a barrel, a projectile by the force of any explosion or other form of combustion.”<sup>5</sup> (§ 12001, subd. (b).)

“[T]oy guns obviously do not qualify as a ‘firearm,’ nor do pellet guns or BB guns because, instead of explosion or other combustion, they use the force of air pressure, gas pressure, or spring action to expel a projectile.” (*People v. Monjaras* (2008) 164 Cal.App.4th 1432, 1435.) Although all three counts require the use of a real firearm; the

---

<sup>4</sup> All statutory references are to the Penal Code.

<sup>5</sup> That definition was included in the instructions given to the jury.

crime of brandishing does not require the firearm be loaded. (See *People v. Sanders* (1995) 11 Cal.4th 475, 542.)

**I. There was sufficient evidence the object in appellant's hand was a firearm.**

The basis of appellant's argument is that there was no evidence the object was capable of being shot, i.e., the victims did not hear the gun being cocked or see him take steps to fire the gun (e.g., they did not state that he tried to put a round in the chamber or pull the trigger), no weapon was found on him or in the Cadillac, and he introduced evidence he was using a cellphone at the time of the incident. Both victims, who admitted they were not knowledgeable about guns, described the object appellant was holding as a small black handgun. The jury found appellant personally used a firearm; thus, the jury rejected appellant's defense this case was one of mistaken identity and any claim the object was a cellphone. The issue is whether there was sufficient evidence the gun was a real firearm.

Appellant notes that more than a witness saying he or she believed there was a gun is necessary to prove the object was a real firearm. In *People v. Monjaras, supra*, 164 Cal.App.4th at page 1436, a robbery case, the court noted:

"Most often, circumstantial evidence alone is used to prove the object was a firearm. This is so because when faced with what appears to be a gun, displayed with an explicit or implicit threat to use it, few victims have the composure and opportunity to closely examine the object; and in any event, victims often lack expertise to tell whether it is a real firearm or an imitation. And since the use of what appears to be a gun is such an effective way to persuade a person to part with personal property without the robber being caught in the act or soon thereafter, the object itself is usually not recovered by investigating officers."

In discussing whether there was sufficient evidence to support a firearm use enhancement, one court reasoned: "The evidence is sufficient to prove the use of a

firearm where there is some type of display of the weapon, coupled with a threat to use it which produces fear of harm in the victim. ‘ . . . [A] firearm is displayed when, by sensory perception, the victim is made aware of its presence. Once displayed in such fashion, the threat of use sufficient to produce fear of harm becomes a use of that firearm proscribed by Penal Code sections 12022.5.’” (*People v. Dominguez* (1995) 38 Cal.App.4th 410, 421.)

In *Monjaras*, the court concluded: “The jury was not required to give defendant the benefit of the victim’s inability to say conclusively the pistol was a real firearm. This is so because ‘defendant’s own words and conduct in the course of an offense may support a rational fact finder’s determination that he used a [firearm].’ . . . ‘[W]ords and actions, in both verbally threatening and in displaying and aiming [a] gun at others, [can] fully support[ ] the jury’s determination the gun was sufficiently operable [and loaded].’ Accordingly, jurors ‘may draw an inference from the circumstances surrounding the robbery that the gun was not a toy.’ (Citations omitted.) (*People v. Monjaras, supra*, 164 Cal.App.4th at pp. 1436-1437; see also *People v. Rodriguez, supra*, 20 Cal.4th at p. 12 [“[A] defendant’s statements and behavior while making an armed threat against a victim may warrant a jury’s finding the weapon was loaded.”])

Although the case at bar did not involve a robbery, the facts surrounding the incident indicate it was more than a case of garden variety road rage as it involved more than an exchange of curses. Appellant asserts there was no verbal comment or conduct from which the jury could conclude the object was a real firearm. However, under the totality of the circumstances, the threat was implied by appellant’s conduct. After Hernandez had honked at the cars blocking her car, those cars finally left. As appellant passed by the Pathfinder (going in the opposite direction), he called Hernandez a name and exchanged curses with Burela. Appellant then turned his car around and followed the Pathfinder through a couple of turns for about 10 minutes. Appellant came up on the driver’s side and pointed a gun at the occupants and moved it back and forth, telling Hernandez to “[g]et out of the way.” Appellant also tried to come up on passenger’s

side but was unable to do so because of cars parked on the curb. It was only when Hernandez told appellant that she had her children with her that he left the scene stating, ““Tell him that I’ll see him afterwards.”” Looking at Burela, appellant pointed his right index finger at his right eye and then pointed it at Burela. The jury could reasonably infer appellant was trying to shoot Burela because Burela had cursed at appellant and because appellant was trying to get on Burela’s side of the Pathfinder. Moreover, it is possible the occupants of the Pathfinder could have been armed. Thus, the jury could reasonably infer the object was a real firearm as there was no advantage in pointing it if it was not.

In addition, according to Deluccia, the gang expert, due to threats from rival gang members, an Avenues gang member would not want to be caught without a gun or the ability to protect himself. There would be no point in an Avenues gang member going out with an unloaded weapon because he would lack the ability to protect himself or assault other gang members. Deluccia had never found any Avenues gang member to have a fake gun. Deluccia also noted that while a younger gang member might have fired his weapon even though a child was in the car, a more seasoned member would be more inclined not to shoot and perhaps settle the dispute later because when a child is shot, it brings more public attention to the gang and makes it harder for them to commit their activities.

Appellant notes the expert never saw the object, and without arguing why it is so, appellant suggests the evidence does not establish he was a gang member at the time of the instant incident. To the contrary, even though at trial appellant denied being a gang member or admitting to the police that he was a member of the Avenues gang, three officers testified about the multiple occasions on which appellant had admitted he was a member of the Avenues and the expert opined appellant was a member of the Avenues gang. Even though the jury found the gang allegation not true, that does not mean it rejected all the testimony of the gang expert. As appellant himself argued, the crime was one of road rage rather than gang-related, meaning it was not for the benefit of the gang.

## **II. There was sufficient evidence the firearm was loaded.**

Appellant contends his convictions on counts 1 and 2 must be reversed because there was insufficient evidence the firearm was loaded. (*People v. Rodriguez, supra*, 20 Cal.4th at pp. 10-11.) “The question of whether or not the gun was loaded is a question for the jury, and the prosecution can establish it by circumstantial evidence.” (*People v. Orr* (1974) 43 Cal.App.3d 666, 672.)

Appellant again asserts the victim’s testimony did not establish that fact, the expert was not present, no firearm was recovered, and the jury rejected the gang allegation. We conclude the same circumstantial evidence which established the object was a firearm also supports a reasonable inference the firearm was loaded.

## **III. The abstract of judgment needs to be corrected.**

Respondent concedes the abstract of judgment needs to be corrected in two ways. First, the abstract reflects the firearm enhancement on count 1 was imposed pursuant to section 12022.5, subdivisions (a) and (b). At the sentencing hearing, the court stated the enhancements on counts 1 and 2 were imposed pursuant to subdivisions (a) and (d).<sup>6</sup> (Cf. *People v. Mitchell* (2001) 26 Cal.4th 181, 185-186 [oral pronouncement controls].) Second, the court awarded appellant 581 days of credit, including 506 days of actual time and 75 days of conduct credit. Appellant was arrested on July 2, 2007, and sentenced on November 20, 2008. Since 2008 was a leap year, appellant was entitled to 508 days of actual time. (*People v. King* (1992) 3 Cal.App.4th 882, 886 [fractional days count as full days].) Appellant was also entitled to 76 days of conduct credit. (*People v. Ramos* (1996) 50 Cal.App.4th 810, 816 [conduct days are rounded downward].) Thus, appellant was entitled to a total of 584 days.

---

<sup>6</sup> The abstract reflects the enhancement on count 2 was imposed pursuant to section 12022.5, subdivisions (a) and (d).

### **DISPOSITION**

The superior court is directed to correct the abstract of judgment to reflect the firearm enhancements on counts 1 and 2 were imposed pursuant to section 12022.5, subdivisions (a) and (d) and to reflect a total of 584 days of custody credit, consisting of 508 days of actual time and 76 days of conduct credit. The superior court is ordered to prepare and file with the Department of Corrections and Rehabilitation an amended abstract of judgment reflecting those changes. In all other respects, the judgment is affirmed.

**WOODS, J.**

**We concur:**

**PERLUSS, P. J.**

**ZELON, J.**